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APPENDIX

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 73-474

UNITED STATES OF AMERICA
ex rel. FRANCIS C. SMITH
Petitioner

V.

CARL ROBINSON, Warden
Connecticut State Prison
Somers, Connecticut

JOHN R. MANSON, Commissioner
Connecticut Department
of Correction:
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCIS C. SMITH
Box 100
Somers, Connecticut
06071

Pro se

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JUDGMENT FILE

STATE V. FRANCIS CLIFFORD SMITH

No. 11,372

At a Superior Court holden at Bridgeport, in and for Fairfield County, on the Second Tuesday of April, 1950.

PRESENT. HON. J. HOWARD ROBERTS, JUDGE

Upon a bill of indictment laid before the Grand Jury in and for Fairfield County, duly summoned, impaneled and sworn which bill of indictment was returned indorsed "a true bill" accusing Francis Clifford Smith of Darien, Connecticut of the crime of Murder in the First Degree and charging that said Francis Clifford Smith on the 23rd day of July, 1949 in Greenwich deliberately, with premeditation and malice forethought, did shoot and kill one Grover S. Hart, against the peace and contrary to the form of the statute in such case made and provided; the defendant appeared and for plea said "not guilty".

The case came thence to May 16, 1950 when the defendant filed his challenge to the array of jurors and the parties appeared and were at issue on the State's demurrer to said challenge to the array of jurors, as on file.

The Court having heard the parties, found the issues upon said demurrer for the State and that said challenge to the array of jurors was insufficient.

The case came again to May 16, 1950 when the defendant filed an amendment to the challenge to the array of jurors and the parties appeared and were at issue on the State's demurrer to said amendment to the challenge to the array of jurors, as on file.

The Court having heard the parties found

the issues upon said demurrer for the State and that said amendment to the challenge to the array was insuffient.

The case came thence to May 24, 1950 when before the jury was sworn the defendant filed a motion for mistrial which motion the Court denied; and again to the same day when after the jury was sworn the defendant again moved in open Court for a mistrial which motion was denied.

The case came thence to June 7, 1950 when after a full hearing the case was committed to the jury which returned a verdict of "Guilty of Murder in the First Degree".

It was therefore considered by the Court that the defendant is Guilty in manner and form charged in the indictment.

The Court thereupon sentenced the defendant to be conveyed to the Connecticut State Prison at Wethersfield, there to be kept until November 20, 1950 when the punishment of death shall be inflicted upon him.

Thereupon the defendant filed a motion to set aside the verdict of the jury. The case came thence to the present time when the Court denied said motion to set aside the verdict.

By the Court

Henry E. Shannon
Assistant Clerk

#11372 State V. Francis Clifford Smith

Sept. 25, 1950 - Appeal Filed

Aug. 7, 1951 - Judgment of Supreme Court "There is no error"

Sept. 12,1951 - Defendant sentenced to death on Oct. 29, 1950

Oct. 28, 1951 - Execution of sentence postponed until Apr. 21, 1952.

Jan. 11, 1952	- Execution of sentence postponed until April 21, 1952.
April 10, 1952	- Execution of sentence postponed until Sept. 15, 1952.
Sept. 4, 1952	- Execution of sentence postponed until Jan. 12, 1953.
Nov. 12, 1952	- Judgment of Supreme Court "There is no error".
Dec. 5, 1952	- Defendant sentenced to death on Jan. 12, 1953.
Jan. 15, 1953	- Execution of sentence postponed until March 16, 1953.
May 11, 1953	- Defendant sentenced to death on June 7, 1954.

APPLICABLE PORTIONS OF TRIAL
JUDGE'S CHARGE TO THE JURY
ON ELEMENT OF UNLAWFUL ACT

Sec. 153 of State Court Record.

The State claims that the accused and Lowden joined in a common design to go armed with revolvers or pistols to the Indian Harbor Yacht Club in Greenwich on July 23, 1949, for the purpose of committing some unlawful act therein, such as larceny and that the natural and probable consequences of the execution of their design involved the contingency of taking human life to prevent capture or to aid in effecting their escape.

Sec. 160 of State Court Record.

If you find that the accused did not actually fire the shot that killed Hart but that it was done by Lowden or another in carrying out a common design entered into by the accused as I have explained to you, then this rule which I am explaining applies. The controlling question is not whether the malice and premeditation of the one who actually fired the shot that killed Hart, if you find such malice and premeditation existed, are imputable to the other, but rather whether existence of the conspiracy or common design to commit an unlawful act renders him responsible for the natural and probable results of the execution of that original unlawful act. If you find

that the accused Smith and another be it Lowden or another at some time prior to the shooting of Hart made up their minds in a common design to commit an unlawful act such as larceny at the Indian Harbor Yacht Club on July 23, 1949, at any hazard and that they knew that the enterprise would be dangerous and expose them to danger should they be discovered in carrying out their unlawful act and that the accused and his companion wilfully, deliberately and premeditatedly and with malice aforethought determined to arm themselves, or to arm any one of them with dangerous weapons such as pistols, and that while engaged in the unlawful act or in the furtherance thereof they were discovered by the deceased and in order to assist their escape the night watchman, Hart, was wilfully killed by being shot to death by one or both of them and that the natural and probable consequences of the execution of the unlawful act which they had entered into a common design to commit involved the contingency of taking human life, then you would be justified in finding such of them as you find entered into that common design and continued into that common design, guilty of first degree murder, notwithstanding the fact that you may find that Hart died as a result of wounds he received from a gun fired by only one of them.

STATE ATTORNEYS' STATEMENT TO
U.S. DISTRICT COURT AS MADE
BY STATE ATTORNEY McGOWAN

In U.S. ex rel. Smith V. Reincke, Civil No. 10712, U.S. District Court for Connecticut, Robert C. Zampano, J., State Attorney McGowan addressed the Court as follows:

"The petitioner has claimed in his petition and has argued before your Honor that the State can't get a conviction of a first degree murder on a claimed theft or a claimed burglary or a claimed breaking and entering.

Well, your Honor, the State didn't charge him with a theft or a burglary or breaking and entering. I ask your Honor to please just refer to page 1 of State's Exhibit 1, the record, and I would just like to read this into the record, your Honor. What I am now going to read is the true bill that was returned by the Grand Jury, and it reads as follows:

'The Grand Jurors within and for said County accuse Francis Clifford Smith of 35 Linden Ave., Darien, in said County, of Murder in the First Degree and charge that on the 23rd day of July 1949, at Greenwich, in said County, the said Francis Clifford Smith wilfully, deliberately, with premeditation and malice aforethought did shoot and kill one Grover S. Hart against the peace and contrary to the form of the statute in such case made and provided.'

Your Honor, the indictment against this man to which he was put to plea upon, to which he went to trial by and was found guilty by a jury of his peers is based upon that indictment. It is not based upon any claim that he committed burlary or that he committed a breaking and entering or a theft and therefore as a result of the commission of such acts a killing or a homicide results it constitutes first degree murder. The State does not make that claim, your Honor.

The State relies entirely upon the wording of that indictment and that is that he did wilfully, deliberately with premeditation and malice aforethought did shoot and kill one Grover S. Hart. It doesn't say what he was doing at the time or that it was in the commission of a felony. And the only reason that the State respectfully submits to your Honor that the evidence that was found in the automobile was introduced into evidence in this trial was not to show that Smith had stolen that stuff from the club, but to show and place Smith in that club becuase these articles, by the testimony of the witnesses from the club, belonged to the club. There was some neckties, there was some tie clasps, all with the insignia of the yacht club on them. There was a man's hat, there was a slip of paper, all of which were identified, your Honor, as being the property of the club.

What is the reasonable and logical inference

from that, your Honor? The State respectfully submits this, that one with those articles in his possession must have gotten them from this particular place of where they claimed ownership. That is the purpose of that, your Honor. It is not to show that Smith committed a burglary or a breaking and entering in that club. And he argued here personally himself this morning that the State failed because he feels that was a twenty-four hour club, open twenty-four hours down there and there would be no need to break into it in order to get into it. Well, there is no such evidence in this club that it was such a type of a club, your Honor, and furthermore, I don't argue that point. I am only commenting upon his observation here this morning, of which he wasn't too certain.

He said he thought it was open twenty-four hours, but we don't claim that we have to establish that this petitioner here committed these acts of theft or larceny or breaking and entering or a burglary in order to substantiate a conviction based upon that indictment as I have read it.

I am sure your Honor knows that if a person deliberately equips himself with a fatal firearm and in the use of that, presumably either to effect a get-away or to destroy any evidence as to his identity, is, under our law, a wilfull, premeditated murder in the first degree with malice

aforethought. That is the basis upon which the State claims that there was adequate evidence offered in this case for the jury to conclude as it did.

Now that, your Honor, is my observation on behalf of the State as far as the charge to the jury is concerned."

STATE V. SMITH, 138 Conn. 196, 201, PARAGRAPH NINE

To warrant a conviction, there must be no reasonable doubt as to any essential element of the crime charged. State V. Newman, 127 Conn. 398, 400, 17 A 2d 774. An essential element of the crime of murder in the first degree as charged in the indictment in this case was that the killing was wilful, deliberate and premeditated. The only reasonable inference from the fact that the defendant in this case carried a deadly weapon with him when he was engaged in the commission of a theft was that he planned to kill any one who interfered with him. That means that for an appreciable period of time before the shot was fired he premeditated a killing. (cases cited). The evidence was adequate to justify the jury in concluding that it had been established beyond a reasonable doubt that the defendant was guilty of murder in the first degree.

OPINION, CONNECTICUT SUPREME COURT
STATE V. SMITH, 138 Conn. 196.

Inglis, J. The defendant was found guilty of murder in the first degree upon an indict ment charging him with wilful, deliberate and premeditated muredr. Upon this appeal, he has assigned as error the denial of his motion to set aside the verdict, the sustaining of a demurrer to his challenge to the array of the panel, the denial of his motion for mistrial, a claimed error in the charge and certain rulings on evidence.

In the early morning of Saturday, July 23, 1949, Grover S. Hart was shot and killed in the clubhouse of the Indian Harbor Yacht Club of Greenwich where he was employed as a night watchman. The principal question in the case is whether the state proved beyond a reasonable doubt both that the defendant was implicated in the killing and that the murder was wilful, deliberate and premeditated. From the evidence, the jury might reasonably have found, among others, the following facts: The bullet which cause the death was discharged from a Smith and Wesson .22 caliber revolver. There were found on the premises, in the near neighborhood of the shooting, two other bullets and four cartridge cases marked XR. At least one of these bullets and the four cartridge cases had come from a .22 caliber automatic pistol.

About half past one in the morning of Sunday, July 24, two New York state policemen discovered parked at the Hollywood Cafe in Brewster, New York, a gray Cadillac automobile with New Jersey registration plates NN 65 A. There was a piece of rope tied to the handle of the trunk to hold it in place. When the car was first seen, one man was standing by the open left front door and another was seated on the right side of the front seat. Thepolicemen left to get their own automobile and by the time they returned to the Cadillac both men had disappeared. There was found in the Cadillac a .22 caliber Colt automatic pistol

with a clip of shells each bearing the marking XR. The pistol was the gun from which the four cartridge cases found at the scene of the crime had been ejected. It was in a leather holster. There was also discovered in the car another leather holster. Both the Colt and its holster and the second holster had been stolen on July 9 from a house in New Canaan, and when stolen the second holster had contained a Smith and Wesson .22 caliber revolver. The Cadillac also contained a hat which was the property of the manager of the Indian Harbor Yacht Club, six neckties bearing the insignia of the yacht club, a memorandum made by an employee of the club, several small pieces of jewelry and two tie clasps, all of which had been removed from the Indian Harbor Yacht Club on the night of the killing. In the Cadillac was a white shirt bearing a laundry mark which indicated that it belonged to a man named Smith who lived in Noroton Heights, Darien. The defendant's parents resided there and at times he stayed with them. There was also a set of Connecticut motor vehicle registration plates marked SA 661.

Shortly before the car was first noticed by the New York police, the defendant was at the bar inside the Hollywood Cafe drinking beer. The Cadillac car had been stolen from Frederick B. Freid of Stamford in June 1949. At that time it bore Connecticut registration plates SS 404. On several occasions during June and July the defendant was seen driving a gray Cadillac car which corresponded in description to the one found by the New York police in Brewster, even to the extent that a rope was tied so as to hold the trunk cover in place. At various times the car driven by the defendant bore Connecticut license plates SS 404 and SL 513. Registration plates Connecticut SL 513 and Connecticut SA 661, found in the car at Brewster, and New Jersey NN 65A had all been stolen from a garage in Stamford.

The defendant was arrested on July 28. He was found concealed in the woods at the Wilton reservoir. He gave the name of Frank Lynch, denying that his name was Smith, and claimed that

he was a member of a camping party which was in the neighborhood. It developed that there was no truth to his claim. He had in his possession a bottle of hair dye.

On the trial the defendant took the stand on his own behalf. He denied that he had any connection with the Cadillac car found in Brewster and offered a rather weak alibi both for the time of the crime and for the time when the car was found. He did admit that he had been driving a Cadillac car during June and July, but claimed that it was a different model and belonged to a gambler by whom he was employed. He accounted for the fact that he had been hiding out from the police on the ground that he thought they were after him for violation of parole from state prison. His answers to questions on cross-examination were evasive to such extent that the jury might reasonably have found that he was entitled to no credit.

It is apparent that the state's case relating to the connection of the defendant with the killing and to proof of the premeditation of the killing rested exclusively on circumstantial evidence. It does not follow from that, however, that it was not a strong case. The law recognises no distinction between circumstantial evidence and direct evidence so far as probative force is concerned. If evidence, whether direct or circumstantial, should convince a jury beyond a reasonable doubt that an accused is guilty, that is all that is required for a conviction. (Cases cited). As has been said so often, proof beyond a reasonable doubt is such proof as precludes every reasonable hypothesis except that which tends to support and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. The requirement that evidence must be such as satisfies beyond a reasonable doubt "does not mean that the proof must be beyond a possible doubt, and a possible supposition of innocence is a far different thing from a reasonable hypothesis." (cases cited).

In the present case the presence in the Cadillac, as it stood at the Hollywood Cafe, of one

of the guns which had been discharged at the scene of the killing and of the various articles which had been taken from the Indian Harbor Yacht Club warrants the inference, in the absence of any evidence to the contrary, that whoever was then in possession of the car had been one of those who did the killing. The fact that the accused was in the neighborhood when the Cadillac was found, that what was probably his shirt was in the car and that he had been driving the same car for several weeks before that time led irresistably to the inference that it was he who was in possession of the car. It follows that this evidence, supported by the evidence of the guilty conduct of the defendant at the time of his arrest and other facts of lesser importance, was sufficient to justify the jury in finding that it had been established beyond a reasonable doubt that the defendant was one of the participants in the crime. (case cited).

To warrant a conviction there must be no reasonable doubt as to any essential element of the crime charged. (case cited). An essential element of the crime of murder in the first degree as charged in the indictment in this case was that the killing was wilful, deliberate and premeditated. The only reasonable inference from the fact that the defendant in this case carried a deadly weapon with him when he was engaged in the commission of a theft was that he planned to kill any one who interfered with him. That means that for an appreciable period of time before the shot was fired he premeditated a killing. (cases cited) The evidence was adequate to justify the jury in concluding that it had been established beyond a reasonable doubt that the defendant was guilty of murder in the first degree.

When the trial of the case started, there were on the regular panel only thirty-four jurors. Seven of these had to be excused because they had already served the statutory period of four weeks. Gen. Stats. Supp. 1949, § 657a. There were no other names on the jury list of the county for the court year. To complete the jury for the trial of the case, the court directed the sheriff to

summon talesmen, and 115 talesmen were called. A total of 112 prospective jurors were summoned on the voir dire before the selection of the twelve jurors and two alternate jurors were completed. Of those 112, 60 were men and 52 were women. The jury as selected were composed of five men and seven women, and the two alternates were women. In the selection the defense used 28 of its 30 challenges.

Before the start of the trial the defendant challenged the array on the ground that there were not enough jurors left on the regular jury list for the court year to permit the obtaining of a jury to hear the case. A demurrer to the challenge to the array was sustained. A challenge to the array is proper only to state an objection to the panel as a whole on some ground that affects the entire panel. (cases cited). It will be allowed only on some ground which arrises out of the proceedings in selecting and summoning the panel. (case cited). The ground alleged in the defendant's challenge to the array was, therefore, insufficient, and the sustaining of the demurrer to it was not erroneous.

After the impaneling of the jury, the defendant moved for a mistrial on the ground stated in his challenge to the array and on the added ground that the use of talesmen deprived him of the safe guards and information which he would have had if the veniremen had been called from the regular jury list. Neither of these grounds was well taken. It was well within the discretion of the trial court to start the trial with only twenty-seven jurors from the regular jury list available. A court may always, when there is "any cause" therefore, resort to the summoning of talesmen to fill out a jury. Gen Stats. § 7925. This is true even though there are persons left on the year's list who have not served. In the present case, if talesmen could not have been resorted to, the trial would have had to be delayed for at least four months. The information to which the defendant referred in his motion was that which appears on the questionnaires returned to the jury commis-

sioners in the selection of qualified jurors, are filed in the clerk's office and are open to inspection by any litigant or his attorney. That such information was not readily available at hand to the defendant in this case did not prejudice him. He was privileged, by examing each talesman on the voir dire, to elicit the same sort of information as would have appeared on the talesman's questionnaire if he had been on the regular jury list. The same objection could be made in any case in which talesmen are used, to the end that the unquestioned power of the Courts to summon talesmen would be of no avail. The denial of the motion for a mistrial was proper.

The complaint which the defendant makes to the charge is nothing more than that, in view of the fact that the charge discussed the evidence in extenso, it should have stated in greater detail the application of the principle that it was for the jury to decide the facts of the case. A reading of the charge discloses that the jury were explicitly instructed that it was their exclusive function to decide all questions of fact, that it was for them to pass upon the credibility of witnesses, that their recollection of the evidence would control and that it was in their province to determine what reasonable inferences were to be drawn from the facts which they found proven. The discussion of the case all through the charge was in such form that the principle that the jury were the sole judges of the facts was implicitly recognised and reflected. There is no merit to the defendant's claim of error in the charge.

The only other matter claimed by the defendant to be reversible error which merits consideration is a series of rulings admitting portions of the testimony of George Lowden, a witness called by the State. When Lowden was first called to the witness stand, he volunteered the statement that he did not wish to testify for either the defense or the prosecution. After testifying that he had pleaded guilty to murder in the second degree in connection with the killing of Grover

Hart, he was asked if he knew Frank Smith. Before he could answer the question, defendant's counsel suggested that Lowden be advised of his constitutional privileges. He was so advised by the Court. Lowden then testified that he did know Smith and that he had seen him in July 1949. He went on to testify that in the morning before taking the stand he had told the state's attorney that he would tell the truth. The jury were then excused and Lowden conferred with the Public Defender as to his right to refuse to testify as to matters which would tend to degrade and incriminate him. After the jury were recalled, the witness, when asked whether he and Smith had been together on the night of July 22, refused to answer. When asked the reason for his refusal, he said, "We will put it that it might incriminate Frank Smith and then I refuse to do so." This answer and several others of like tenor which were given in the further examination of Lowden were, upon motion of the defendant, later stricken and the jury were told to ignore them. Likewise some testimony of the same witness as to the contents of a statement given by him to the police was later stricken and the jury told to ignore it. The defendant also excepted to the Court's ruling which permitted the state's attorney to cross-examine Lowden. It was clear that the state was taken by surprise by the witness' refusal to testify on important matters, and under the circumstances it was well within the discretion of the court to allow cross-examination. (case cited). That testimony of Lowden objected to by the defense which was allowed to stand was properly admitted.

There is no error.

In this opinion the other judges concurred.

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS, U.S. DISTRICT COURT

And now comes Frederick E. Adams, Warden, of the Connecticut State Prison, respondent in the above entitled cause of action and makes return that:

1. The petitioner Francis C. Smith is now in the custody of the respondent by virtue of a State Prison mittimus based upon a judgment of the Superior Court within and for the County of Fairfield, rendered on the 7th day of June 1950, a certified copy of which judgment is attached hereto and made a part hereof and filed in this court. The Board of Pardons at a later date, June 7, 1954, commuted the aforesais verdict and sentence to one of life imprisonment which is now in full force and effect.

2. As to the remaining allegations in the petition for a writ of habeas corpus now pending before this court, the same are denied in their entirety.

3. The respondent affirmatively pleads that portions of the matters herein have never been submitted for determination by Courts of the State of Connecticut prior to the commencement of this proceeding.

4. The respondent affirmatively pleads that portions of the matters herein have previously been determined by the United States District

Court in the case of United States ex rel. Frank C. Smith, Petitioner, V. Frederick G. Reincke, Warden, Civil No. 10712 and that said determination is res judicata and finally determinative.

Respondent

By Richard F. Jacobson

Copy to Petitioner

PETITIONER'S REPLICATION TO THE RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS, U.S. DISTRICT COURT

And now comes Francis C. Smith, petitioner in the above entitled action, who replies to the Return of the Defendant that:

1) The jurisdiction of this Court is a matter solely within the discretion of this Court, and that the petitioner has shown good cause therefor in his petition for habeas corpus, and further this is the only Court in which the State Attorneys have admitted that no unlawful act of any kind was involved in the crime charged.

2) The petitioner affirmatively denies that any matter alleged by him in his petition is res judicata and that he is supported in this by applicable federal decisions, and further that no claim other than the third has been previously presented to this Court by this petitioner, and

the petitioner states further that the defendant makes his allegations in most general and vaguest terms whereas the petitioner has precisely pinpointed his claims and allegations which for the most part specify that the Connecticut Courts in this case have overridden the Connecticut State Legislature in its legislative enactment, and that in so doing the said courts overrode State Constitutional provisions as to separation of powers and allowed a petit jury to remake and fashion the law also contrary to State Constitutional provisions in regard to both the powers of the General Assembly, and the Grand Jury, in which the said Courts also had a hand and so rendered, among other things, the Connecticut Statute involved unconstitutional under the 14th Amendment to the Constitution of the United States, as well as other Constitutional rights as alleged in the petition, all of which has a thrust under constitutional law different in kind from anything yet presented by this petitioner in this Court, and the petitioner therefore denies all the allegations of the defendant in this respect.

Respectfully submitted.

Francis C. Smith
Petitioner, pro se

Copy to State Atty.

MOTION FOR SUMMARY JUDGMENT

And now comes the petitioner in the above entitled action, who says on his personal knowledge that:

1) The indictment as set out in paragraph 21 of the petition for habeas corpus is the true indictment rendered by the Grand Jury for Fairfield County Connecticut against the petitioner.

2) Section 8350 of the Connecticut General Statutes Revision of 1949 is as alleged in chapter 19 of the petition for habeas corpus, in its applicable portions.

3) The trial judge charged the jury as set out verbatim in paragraphs 14 and 16 of the petition for habeas corpus, which charge was made in the petitioner's presence.

4) Article First Section 9 of the Connecticut Constitution as effective in 1949 and 1950 read as alleged in paragraph 20 of the petition for habeas corpus.

5) State Attorney McGowan addressed the Court as alleged and set out verbatim in paragraph 24 of the habeas corpus petition

6) The Connecticut Supreme Court of Errors upheld the petitioner's conviction as a killing in a theft as reported in the official Connecticut Supreme Court Reports, State V. Smith, 138 Conn. 196.

7) The Connecticut Superior Court imposed a

three to seven year sentence upon the petitioner as stated in the ninth claim of the petition for habeas corpus.

Wherefore the petitioner moves for Summary judgment on all claims except the third and fourth claims as made in the petition for habeas corpus.

Dated May 15 at Somers, Connecticut.

Francis C. Smith
Petitioner, pro se

State of Connecticut
County of Tolland ss. Somers, Connecticut

The truth of the foregoing has this 15th day of May 1972 been sworn to and attested to, the attestor Francis C. Smith having been first duly sworn upon oath, at Somers, Connecticut.

Robert P. Callahan
Notary Public

Seal of Notary Public

AFFIDAVIT RE MOTION
FOR SUMMARY JUDGMENT

And now comes Francis C. Smith, the petitioner in the above entitled action, who swears, attests and deposes to the truth of all matter as alleged in his Motion for Summary Judgment, and all matter as alleged in the Statement of

Facts in his petition for a writ of habeas corpus.

Francis C. Smith
Petitioner, pro se

State of Connecticut
County of Tolland ss.

Somers, Connecticut

On this 15th day of May 1972, in the Town of Somers, Connecticut, appeared before me the petitioner in the above entitled action, Francis C. Smith, who, being first duly sworn, attested to the truth of the foregoing above.

Robert P. Callahan
Notary Public

Seal of Notary Public

(Copy to State Atty.)

THE CLAIMS UPON WHICH SUMMARY JUDGMENT WAS MOVED IN U.S. DISTRICT COURT

Wherefore the petitioner, Francis C. Smith, appears and pleads that his Constitutional rights as guaranteed by the Fourteenth Amendment and the due process of law clause of the Constitution of the United States of America were violated:

1. By the Connecticut Supreme Court in upholding his conviction as a crime of murder in the first degree for a specific offense which the

Connecticut State Legislature made murder in the second degree by specific provision and exception.

2. By the prosecutors for the State knowingly allowing evidence to be used to obtain a conviction for a killing in an unlawful act which said prosecutors knew had never been committed, and also knew and have admitted that said evidence was not introduced to claim or prove any unlawful act and that no unlawful act of any kind such as burglary, theft, breaking and entering, or robbery was intended or meant to be claimed by the State as part of the crime charged, although said prosecutors stood silently by and allowed the jury to be charged that it could convict and have the petitioner sentenced to death for a killing in an unlawful act that they knew had never happened, and also stood silently by as the Connecticut Supreme Court of Errors upheld the conviction and allowed that articles taken from an automobile twenty-four hours after the commission of the crime charged "proved" that an unlawful act had been perpetrated as part of the crime charged.

5. By the Connecticut Supreme Court of Errors in upholding the petitioner's conviction contrary to the intent of the body that possessed the sole State Constitutional authority to indict and charge, the Grand Jury for Fairfield County, Connecticut, which said body in its indictment char-

ged murder in the first degree "contrary to the form of the statute in such case made and provided."

6. By the act of the Connecticut Supreme Court of Errors holding that an "unlawful" act had been proved when the petit jury could not have found any determinable unlawful act "proved" because the legal elements of no "unlawful" act were defined to the jury, and therefore just what kind of an "unlawful" act the jury supposedly found "proved," if in fact any at all, was incapable of determination by the said Court, which therefore could not hold that any "unlawful" act had been found proved by the jury, especially one that by law constituted murder in the first degree under the statute.

7. By the Connecticut Supreme Court of Errors allowing by its decision the petit jury to determine what kind of an "unlawful" act would constitute murder in the first degree, although the Connecticut statute defined only certain "unlawful" acts a killing in which was murder in the first degree, under which statute the petitioner was indicted by the Grand Jury "contrary to the form of the statute in such case made and provided."

8. In that Section 8350 of the Connecticut General Statutes Revision of 1949 was too vague and uncertain as applied by the Connecticut Courts and Connecticut Supreme Court of Errors for the petitioner to have been able to ascertain just

what he was supposed to defend against.

9. In that the State Courts have imposed upon the petitioner further sentence because he sought to avoid and defend himself against the sentence herein challenged and complained of.

SUPPLEMENTARY AFFIDAVIT TO
MOTION FOR SUMMARY JUDGMENT

And now comes the petitioner in the above entitled action, Francis C. Smith, who says that;

1) The petitioner in the above entitled action was present at all times when evidence was presented at the trial which resulted in the present conviction now challenged in the above entitled action and that the petitioner has and possesses personal knowledge of all matters that had to do with the selecting and impaneling of the jury in the said case on the trial, as well as the presentation of the evidence on the trial to the jury, and the trial judge's charge to the jury.

2) That all matter of fact as alleged and stated in the petition and Amended petition for a writ of habeas corpus are true on the personal knowledge of the petitioner.

3) That the one and only ground upon which thejury were instructed that they could convict for murder in the first degree as a deliberate

and premeditated murder was that of an alleged killing in an unlawful act if the jury found that there had been such.

Francis C. Smith
Petitioner, pro se

State of Connecticut
County of Tolland ss.

Somers, Connecticut

On this 13th day of October 1972, personally appeared before me the petitioner in the above entitled action, Francis C. Smith, who, being duly sworn, states on his oath that the foregoing allegations made on his signature are true on his personal knowledge.

Peter J. Seaha
Notary Public

Seal of Notary Public

Copy to State Atty.

MEMORANDUM OF DECISION,
U.S. DISTRICT COURT

This is another in a series of applications filed by the petitioner challenging his state conviction of first degree murder of June 7, 1950. See e.g. State V. Smith, 138 Conn. 196 (1951); Smith V. State, 139 Conn. 249 (1952); Smith V. State, 141 Conn. 202 (1954); United States V. Reincke, 239 F. Supp. 887 (D. Conn. 1965), aff'd, 354 F. 2d 417 (2 Cir. 1965).

A careful review of the voluminous moving papers of Smith's latest application for a writ of habeas corpus indicates that, with one exception, each allegation of a denial of a constitutional right during his state trial was judicially considered and rejected on prior occasions. No sound reason is advanced why this Court should again consider and rule upon them. The petitioner asserts no new facts or issues not previously presented to this Court, and the petitioner has made no showing that the ends of justice would be served by permitting the redetermination of the merits of this subsequent application. See Sanders V. United States, 373 U.S. 1, 15 (1962).

The only issues not previously adjudicated is the claim that the statute persuant to which petitioner was convicted, Conn. Gen. §§ 8350, was unconstitutionally vague and uncertain to support that conviction. Since it appears this

contention was not raised in the petitioner's prior applications for relief in the State Courts, he has failed to exhaust his state remedies as mandated by 28 U.S.C. § 2254. In addition, however, the claim has no merit.

Smith contends the statute is unconstitutional because he did not know "what he was to be convicted of until he was notified of that which the State court decreed him guilty." In effect, this argument is a rehash of his prior attacks on the sufficiency of the indictment and his claim that the conviction was based on a ground not alleged in the indictment. See United States V. Reincke, supra, 239 F. Supp. at 891-92. The indictment clearly charged him with premeditated murder done with malice aforethought and that is exactly what he was convicted of after a lengthy state trial.

Accordingly, the petitioner's application for a writ of habeas corpus is denied.

Dated at New Haven, Connecticut, this 18th day of April, 1973.

Robert C. Zampano
U.S. District Judge

JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

This cause came on for consideration on a petition for a writ of habeas corpus, and the Court having entered its Memorandum of Decision thereon under date of April 19, 1973, denying the said petition,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered, dismissing the petition for a writ of habeas corpus.

Dated at New Haven, Connecticut, this 24th day of April, 1973.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court.

FRANCES J. CONSIGLIO
Deputy-in-Charge

ORDER OF JUNE 26, 1973, IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DENYING APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS, AND ITS DISMISSAL.

A motion having been made herein by relator pro se for a certificate of probable cause,

Upon consideration thereof, it is
Ordered that said motion be and it hereby is denied.

Henry Friendly
Wilfred Feinberg
Walter R. Mansfield
Circuit Judges